

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MISTY WHITE, JERMAINE BRADFORD, JANARA)
MUSGRAVE, LANDON PROUDFIT, BRADLEY)
BARBER, JR., and DAKOTA KAPPUS, on)
behalf of themselves and all others)
similarly situated; and OKLAHOMA)
STATE CONFERENCE, NAACP,)

Plaintiffs,)

vs.)

Case No. 19-CV-1145-JD

HON. PAUL HESSE, in his official)
capacity as presiding District Court)
Judge; HON. JACK MCCURDY, in his)
official capacity as District Court)
Judge; HON. BARBARA HATFIELD, HON.)
CHARLES GASS, HON. KHRISTAN STRUBHAR,)
in their official capacities as)
Special District Judges in the)
Canadian County District Court; and)
CANADIAN COUNTY DISTRICT COURT, 26TH)
JUDICIAL DISTRICT,)

Defendants.)

TRANSCRIPT OF TELEPHONIC MOTIONS TO DISMISS

SEPTEMBER 24, 2021, at 1:00 P.M.

BEFORE THE HONORABLE JODI W. DISHMAN, JUDGE PRESIDING

Recorded by mechanical stenography
Transcript produced by computer-aided transcription

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(ALL VIA SPEAKERPHONE:)

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(Appearances continued)

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A P P E A R A N C E S

(ALL VIA SPEAKERPHONE:)

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1 (Call to Order of the Court.)

2 THE COURT: Good afternoon. We are here for a
3 telephonic conference in *White v. Hesse*, Case No. 19-CV-1145.

4 Because this is a telephonic conference, we need to try
5 for only one attorney speaking per side so that we have a clear
6 record.

7 I am on the line along with my courtroom deputy, Nyssa
8 Vasquez; and my law clerk, Samuel Merchant; and our court
9 reporter, Cassy Kerr.

10 To have a clear record, anyone speaking should identify
11 themselves before speaking unless I have called on you by name.

12 Given the number of attorneys in this case, I understand
13 that Plaintiffs' counsel will have a primary speaker for this
14 call. Will that attorney please announce an appearance and let
15 me know who else is on the line on behalf of the plaintiffs and
16 whether you anticipate anyone else speaking today?

17 MS. TRIGILIO: Good afternoon, Your Honor. This is
18 Trisha Trigilio for the plaintiffs. I'll be speaking this
19 afternoon. Also appearing by phone for the plaintiffs are Zoe
20 Brennan-Krohn, Brandon Buskey, Marta Cook, Blake Johnson, and
21 Megan Lambert; and I don't anticipate my cocounsel speaking
22 this afternoon.

23 THE COURT: Thank you, and welcome.

24 Can the counsel for the defendants identify who will be
25 speaking and also identify anyone else on the line?

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1 MS. MOORE: Good afternoon, Your Honor. This is Erin
2 Moore, and I will be the primary speaker, and I do not
3 anticipate anyone else speaking today. Also on the line with
4 me today are Stefanie Lawson and Devan Pederson.

5 THE COURT: And good afternoon to you all as well.

6 As set forth in the enter order setting this conference at
7 Docket Number 52, we are here today for a discussion on the
8 complaint, which is filed as a punitive class-action complaint
9 at Docket Number 1; Plaintiffs' motion for class certification
10 at Docket Number 5; Defendant Canadian County District Court,
11 26th Judicial District's motion to dismiss at Docket Number 35;
12 and Defendant state judges' motion to dismiss at Docket
13 Number 36.

14 I thought a conference was the most efficient way to deal
15 with the pending issues in this case. I will try to keep this
16 short, and I do not need argument today given how I expect us
17 to work to advance this case in compliance with the Court's and
18 the parties' obligations under Federal Rule of Civil Procedure
19 1.

20 Following this conference, a minute sheet will be issued
21 onto the docket -- and potentially a short order.

22 As I stated in my order setting this hearing, the goal
23 today is to narrow down or resolve as many things as possible
24 in this case without unnecessary motion practice.

25 We are on the original complaint, and I do think that the

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1 complaint can be amended to cure some of the raised defects.

2 Additionally, Plaintiffs have indicated, in at least some
3 of their briefing, that, if I deem the complaint insufficiently
4 clear as to any matters raised in the motions to dismiss, that
5 they have requested an opportunity to amend.

6 However, before we get into that, I want to give you-all
7 some background on status of things up here at the courthouse,
8 which will hopefully explain in part my desire to get you-all
9 before me this afternoon to move this case forward and
10 hopefully explain some of the delay on my end in reaching your
11 initial pleadings dispute.

12 As you-all are no doubt aware and as a recent general
13 order in the Eastern District of Oklahoma describes, the
14 Eastern District of Oklahoma is receiving and is going to
15 continue to receive waves of new cases as a result of the
16 *McGirt* decision. The Eastern District of Oklahoma usually has
17 around 97 criminal cases per year, and it expects to have
18 upwards of 2,500 by the year 2023 as a result of *McGirt*.

19 You may be asking, "Why does that impact our case in the
20 Western District?"

21 Well, that is because the Western District of Oklahoma is
22 assisting in taking hundreds of those cases in addition to our
23 Western District of Oklahoma dockets. As a result, I'm going
24 to need competent counsel in all of my cases, such as those
25 before me this afternoon, to resolve as much as you can by

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1 working professionally and -- by working professionally
2 together and only bring very narrow and legitimate disputes
3 before me.

4 As you also know, criminal cases get priority over civil
5 cases, and, given the increase in my criminal docket and
6 transferred cases with motions and the ongoing pandemic, it has
7 taken me some time to turn to this case; but, now that I have,
8 my goal, consistent with Rule 1, is to get you-all moving so
9 that we can advance this case.

10 I'll go ahead and give you-all my tentative conclusion of
11 this hearing now, which I indicated in my order setting this
12 for hearing. I intend to discuss possible deficiencies in the
13 complaint and then give Plaintiffs an opportunity to amend the
14 complaint after conferring with the Defendants and addressing
15 my comments and concerns from this call.

16 I would ask, if you are in a position where you are --
17 where you can take notes, and you are not already taking notes,
18 that you do so, though the minute sheet from today's conference
19 will give you any pertinent deadlines.

20 That first brings me to the complaint. All that Rule 8
21 requires is a short and plain statement of the claim.

22 Rule 12(f) provides that I can strike any redundant,
23 immaterial, impertinent, or scandalous matter. Put simply,
24 parties need -- don't need to try their case to the jury or to
25 the public in the pleadings. They can do that on the

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1 dispositive motions or at trial; and, in other instances where
2 I have seen the level of redundancy I see in this complaint, I
3 have stricken the complaint and called for a short and plain
4 statement under Rule 8.

5 I think the complaint here can be streamlined to include
6 only the allegations that are necessary to state plausible
7 claims for relief, eliminate any evidence or statistics that
8 might not be necessary to allege the claims, and avoid
9 unnecessary repetition. So this would be an area I would
10 expect counsel to address in -- in any amended complaint.

11 Second, as an overarching comment, I will note that,
12 although I don't want to control, and I don't plan to control,
13 the parties' legal strategies, I have an obligation to manage
14 my docket for the efficient, just, and speedy resolution of
15 disputes. Seeing the likely amendment, this is how I have
16 determined to exercise that discretion and obligation in this
17 case.

18 I will also note that I am opposed to motions to dismiss
19 just for the sake of filing a motion to dismiss particularly
20 after conferences like these where we try to work through
21 disputes without unnecessary motion practice.

22 I will tell you that it was my practice before taking the
23 bench that, if I had a basis for a motion to dismiss, I would
24 reach out to confer with opposing counsel. This was
25 particularly so on *Twombly*-type issues where amendment could

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1 cure the issue but also if I thought there was a legal bar or
2 some reason a claim or a party could not assert a claim or be a
3 party in a case.

4 Here, given the request to amend by Plaintiffs that is
5 noted in one of Plaintiffs' briefs, this is the way I -- I have
6 concluded is necessary to manage this docket and case and to
7 get it moving, particularly with my obligation toward criminal
8 cases following *McGirt*.

9 As I walk through the motions to dismiss, to speed things
10 up, I will simply use the case name if I am giving you a case
11 and then provide full case citations in my minute sheet that I
12 will enter after this proceeding.

13 So, with that overview and now getting to the motions to
14 dismiss, each generally argues, among other things, that the
15 complaint is not clear at times: which plaintiffs assert which
16 claims against which defendants.

17 About this, I agree. In some claims and allegations,
18 particularly those allegations relating to misconduct or
19 liability, the plaintiffs are lumped together, and, in some,
20 the defendants are lumped together. This is particularly
21 concerning the state judges but applies to all claims and all
22 defendants. This has required the defendants to essentially
23 guess or assume which allegations are asserted against which
24 defendant, which does not satisfy federal pleading standards or
25 directions the Supreme Court and the Tenth Circuit have given

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1 on the plausibility standards under cases like *Twombly*, *Iqbal*,
2 and *Robbins v. Oklahoma* out of the Tenth.

3 The Tenth Circuit recently affirmed a dismissal in *Hart*,
4 which is a 2015 unpublished case, on a similar basis where the
5 district judge stated that the Court and the parties were left
6 to guess and attempt to parse out which claims relate to which
7 individuals because Plaintiff regularly rotated between
8 references to defendants and individual defendants without
9 making it clear which allegations are directed to which
10 defendant or defendants.

11 Plaintiffs tried to clean this up in the responses to the
12 motions, but arguments by counsel in a response brief are not
13 allegations in a complaint. I think the complaint must be
14 amended and cleaned up to bring clarity on who is alleged to do
15 what to whom and when before we move forward. This means more
16 precisely targeting a specific plaintiff's allegations against
17 a specific defendant, probably breaking up each defendant into
18 a separate section or grouping them more clearly. Fail --
19 failure to do so might result in dismissal for failure to
20 comply with federal pleading standards if faced with another
21 motion to dismiss.

22 Next, the motions then state that certain other claims do
23 not have a factual basis and that I should dismiss under Rule
24 12(b)(6), *Iqbal*, and *Twombly*.

25 About this, at least for some of the claims, I agree.

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1 First, for Plaintiff White and Plaintiff Musgrave's
2 discrimination claims against Canadian County District Court,
3 before a public entity can be required under the ADA to provide
4 an auxiliary aid necessary to afford an individual an equal
5 opportunity to participate in the entity's services, programs,
6 or activities, the entity must have knowledge that the
7 individual is disabled either because that disability is
8 obvious or because the individual or someone else has informed
9 the entity of the disability, and that's a 2007 Tenth Circuit
10 case called *Robertson*.

11 For Plaintiffs' accommodation claims, accommodation is
12 only required under the ADA if a public entity has knowledge or
13 it is obvious that the individual requires an accommodation of
14 some kind to participate in or receive the benefits of its
15 services. In addition to *Robertson*, I cite *Ewing v.*
16 *Doubletree*, a 2016 unpublished Tenth Circuit case.

17 Thus, Plaintiffs must plausibly allege that Canadian
18 County District Court knew either by being informed or because
19 it was obvious that White and Musgrave, number one, had
20 disabilities and, number two, needed accommodations for those
21 disabilities. A general sense of a disability and
22 accommodation is typically not enough, and that comes from
23 *Trujillo*, which is a District of New Mexico FRD publication
24 case.

25 The ADA does not require clairvoyance, and that comes from

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1 *Smith v. Midland*, which is a Tenth Circuit 1999 case.

2 Canadian County District Court argues, among other things,
3 that the two claims against it should be dismissed because
4 Plaintiffs have not plausibly alleged that Canadian County
5 District Court had knowledge of Plaintiffs' disabilities or
6 knowledge of the need for accommodations.

7 Plaintiffs respond with what they, quote, "will show,"
8 closed quote, but have not plausibly alleged this in the
9 complaint.

10 I tend to agree with Canadian County: that Plaintiffs
11 have failed to state an ADA or rehabilitation claim in the
12 current complaint. There are no plausible allegations that any
13 named defendant knew about -- or knew about any of White or
14 Musgrave's alleged disabilities or knew that any accommodation
15 was necessary, nor does the current complaint plausibly allege
16 that these alleged disabilities, which are mental disabilities
17 that, according to the complaint, did not physically manifest
18 any perceptible way to the defendants, were obvious to any
19 named defendant.

20 Although Plaintiffs allege that White informed a nurse and
21 others at the jail, there is no allegation that she informed
22 any of the named defendants of any disability or need for
23 accommodation, nor does the complaint plausibly allege that the
24 jail's knowledge or liability should be imputed to any of the
25 named defendants. With no plausible allegations that any named

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1 defendant knew of a disability or knew of a needed
2 accommodation or that either of those were obvious under
3 *Robertson* and related cases, the complaint fails to state those
4 claims.

5 I have located a substantial number of cases dismissing
6 similar claims for similar reasons, some of which I will
7 include in my court minute, for Plaintiffs to take a closer
8 look before they amend this claim or to decide if this is a
9 claim that should not go forward under their Rule 11
10 obligations.

11 In summary, I think these claims need to be repled or
12 dropped from the amended complaint if they cannot sufficiently
13 be repled under the case law and statutory standards and under
14 Rule 11 in the applicable rules of professional conduct.

15 Additionally, on whether Canadian County is a suable
16 entity, Canadian County argues that Canadian County District
17 Court, 26th Judicial District, is not a suable entity, citing
18 Federal Rule of Civil Procedure 17(B).

19 Plaintiffs respond that Canadian County District Court is
20 a, quote, "public entity," closed quote, under Title II and the
21 ADA and, therefore, has capacity to be sued.

22 No party has pointed to binding authority on the issue of
23 whether Canadian County District Court has the capacity to be
24 sued for the ADA and rehabilitation claims.

25 At least three times, the Western District of Oklahoma has

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1 dismissed Section 1983 claims against Oklahoma state district
2 courts for Plaintiffs' failure to clearly establish that the
3 district courts are suable entities, but this was because only
4 a, quote, "person," closed quote, can be liable under Section
5 1983. I will cite these authorities in my minute sheet today.
6 They're *Agrawal, Harper, and Hines*.

7 Canadian County District Court citations to *Martinez v.*
8 *Winner* and *Mason v. Twenty-Sixth Judicial District of Kansas*
9 are in opposite because those are both also 1983 cases and do
10 not support the proposition that Canadian County District Court
11 is not a suable entity for purposes of the ADA claim or
12 rehabilitation claim, which are different statutes and do not
13 require a "person" -- and person in quote -- to be liable.

14 Plaintiffs argue that the Court should look to the ADA and
15 various federal authorities to determine whether Canadian
16 County District Court is a, quote, "public entity," closed
17 quote, but Rule 17(B) seems to provide that the Court should
18 look to the law of the state where the Court is located to
19 determine capacity to be sued.

20 I am not making any rulings on this issue today, but I
21 have doubts about whether Canadian County District Court is a
22 suable entity. I want the parties to conduct further research,
23 confer about this issue, and exchange that research; and, if
24 Canadian County District Court is still named as a party in the
25 amended complaint, I will need more complete support in any

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1 future filings.

2 It is the Plaintiffs' burden to demonstrate with certainty
3 that Canadian County District Court is a suable entity, and
4 that proposition comes from the *Hinton* case, which is a 2010
5 unpublished case.

6 If another motion to dismiss or briefing needs to be filed
7 on this issue, keep in mind what the Supreme Court has said
8 about precedent and binding law. District court orders,
9 whether from a different judicial district, same judicial
10 district, or even same judge are not precedent and do not
11 create binding law. That comes from a footnote in *Camreta v.*
12 *Greene*, which is a Justice Kagan Supreme Court case.

13 So, to the extent you-all are briefing issues again in
14 this case, I expect statutes, any pertinent regulations and
15 rules, and then binding case law; and, if you cannot find
16 binding case law, keep in mind that it is all persuasive, at
17 that point.

18 Next, regarding the state judges' motion to dismiss, the
19 response by the plaintiffs focuses on Judge Hesse regarding the
20 bail-setting policy.

21 I question: Isn't there a distinction between a chief
22 judge and other judges regarding judicial immunity?

23 The other judges do not create the bail-setting policy
24 and, I would think, would be entitled to judicial immunity on
25 claims regarding the actual enforcement of a policy they did

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1 not create.

2 I -- I understand the claim that the chief presiding judge
3 is in an administrative capacity when drafting the bail-setting
4 policy, but I think consideration needs to be given that that
5 doesn't apply to all of the judges.

6 So, if the claims against the other individual judges are
7 going forward, the complaint should be amended to assert
8 specific allegations about specific judges and assert specific
9 claims about specific judges and specify the relief sought from
10 each judge. Right now the complaint combines them all
11 together, which I think is improper and unnecessarily
12 complicates the case because the Court and the defendants have
13 to essentially guess at exactly what relief and claim is sought
14 from each defendant.

15 Regarding the Sixth Amendment claims, I am going to wait
16 until I see the amended complaint to address the Sixth
17 Amendment claim, but I agree with the defendants: that this
18 could probably be beefed up in an amended complaint.

19 Next, turning to the NAACP's First Amendment claim, I am
20 not convinced that the NAACP has standing here beyond the other
21 potential issues with the NAACP's claim. As the state judges'
22 motion to dismiss points out at pages 23 and 24, there is no
23 allegation that one of the named defendants disallowed the
24 NAACP member from attending certain proceedings. It notably
25 and repeatedly uses the passive voice when discussing this

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1 topic. Quote, "The NAACP of Oklahoma's member was denied
2 access and told that arraignments are only held on Tuesdays and
3 Thursdays and that he could not observe them because they are
4 held in judicial chambers," closed quote. That's Docket
5 Number 1, the current complaint, paragraph 101.

6 There is nothing in the complaint, as it stands, regarding
7 who told the NAACP member this; whether it was even accurate,
8 i.e., whether this is actually the policy; or whether members
9 of the public are plausibly prohibited from viewing initial
10 appearances and arraignments, assuming for today's purposes
11 they have a right to view these; or whether, if I were to grant
12 the relief or remedy requested, it would resolve this claim.

13 I understand that the response to the motion to dismiss
14 says that some undefined clerk made the statement, but
15 arguments in a response brief are not allegations, and I am
16 required to look only at the allegations in the complaint at
17 the pleading stage; and, even if it was a clerk, I still have
18 the issues I mentioned earlier regarding this person's
19 authority, whether this is an actual prohibition or policy,
20 including whether there are alternatives for public viewing
21 beyond chambers with members of the public during a pandemic.

22 So the NAACP issue needs to be addressed in the amended
23 complaint; and if, subject to Rule 11 in the applicable rules
24 of professional conduct, the NAACP cannot further support its
25 allegations, it should be removed as a party.

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1 Regarding Younger abstention, unless something drastic
2 changes in the amended complaint, I do not think that Younger
3 abstention applies, so the defendants can drop that issue.

4 There certainly are other possible issues with the
5 complaint and motions to dismiss, but I do not intend to
6 address every one of them today or give formal rulings, but I
7 think that discussing these with you now can avoid protracted
8 and unnecessary briefing over the pleadings, particularly given
9 the plaintiffs have noted they would seek leave. If I had
10 caught this earlier, I would have ordered the plaintiffs to
11 file an amended complaint in response to the motions to
12 dismiss, but now that you-all have full briefing, you have a
13 good idea of positions and can flush this out so we can move
14 forward.

15 Rather than dismissing the complaint, I am going to give
16 Plaintiffs an opportunity to amend, as they have requested;
17 and, if they can't cure the deficiencies subject to the
18 applicable rules, then they should drop those allegations or
19 claims and should further support the remaining claims.

20 I will also state that, for the plaintiffs, the simpler
21 and cleaner you make the complaint, the easier it is for us to
22 move past the pleading stage.

23 I would like counsel for all parties to review all the
24 briefing, all of their positions, and all of our discussions
25 here today and then have a good faith conference between all

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1 counsel, which can be in person, by video, or telephonic. And,
2 by "all counsel," I mean counsel with authority who's
3 responsible for filing motions and amended complaints, which I
4 assume is everyone, but I will let you-all work that out.

5 The purpose of the conference is to make sure that
6 everyone is on the same page with regard to the claims and
7 defenses and to see what issues in the motions the parties can
8 resolve without unnecessary motion practice. This may
9 ultimately mean each side giving up something and taking
10 something.

11 Maybe Plaintiffs need to drop a claim or defendant; assert
12 a claim against a different defendant, if they have named the
13 wrong or uncertain individual, entity, or in the wrong
14 capacity; or beef up some of the allegations on certain claims
15 to avoid an unnecessary motion to dismiss.

16 Maybe the defendants need to simply let weaker arguments
17 go at this stage and focus on stronger ones or simply answer
18 certain claims and move on down the road.

19 I am not forcing the parties to agree, but I am
20 foreshadowing some of my rulings to save you-all and the Court
21 time and expense, which I think is consistent with all of our
22 obligations under Rule 1 and with my independent duty to manage
23 my cases and dockets.

24 I think that the plaintiffs likely can state some kind of
25 claim against some of the defendants that gets past the

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1 pleading stage. I expect that the parties will be able to
2 agree on all or at least most of the issues raised in the
3 original motions to dismiss. Even if all issues cannot be
4 resolved, I think you-all can narrow down the issues to one or
5 two narrow issues and only certain defendants.

6 This process includes the parties conferring in good faith
7 and then Plaintiffs circulating a draft amended complaint with
8 proposed changes; Defendants' counsel reviewing that amended
9 complaint as proposed; the parties conferring again; Plaintiffs
10 revising the proposed draft, if necessary and if they agree,
11 and then filing an amended complaint.

12 The defendants can answer in full or in part after that or
13 file a much narrower motion to dismiss, if that is absolutely
14 necessary, within the time frame under the federal rules.

15 As I have intended to caution the parties throughout,
16 please remember that both the complaint and any motions are
17 subject to the federal rules, which includes -- which includes
18 Rule 11, meaning I can sanction parties or counsel for
19 positions that do not meet the requirements of Rule 11.

20 Also, if it helps you-all, I will let you know, which I do
21 not believe will come as a secret or a surprise -- but, if a
22 position or argument is not expressly supported by a statute or
23 a binding case law, I am generally not inclined to side with
24 such a position. So, to the extent you are reaching on
25 arguments or are relying on nonbinding authorities, I can tell

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1 you now that you may have an uphill battle, and your time and
2 resources may be spent better elsewhere.

3 Plaintiffs have also filed a motion for class
4 certification at Docket Number 5. I think that this motion is
5 premature given that Plaintiffs are going to amend and that we
6 are not sure which claims we are actually working with
7 regarding which plaintiffs and which defendants. For example,
8 I cannot make conclusions on whether there are questions of law
9 or fact common to the class or whether the claims or defenses
10 of the representative parties are typical of the claims or
11 defenses of the class, as required by Rule 23, before I rule on
12 motions to dismiss or before amendment that might resolve some
13 claims.

14 In these circumstances, I intend to set a class
15 certification briefing schedule after we get through a set of
16 pleadings to work from and, as part of that briefing schedule,
17 would give the plaintiffs a deadline to file their initial
18 motion for class certification.

19 We will have a conference as needed later in the case with
20 the parties to discuss the class certification motion and
21 briefing. For now, I believe I either need to have Plaintiffs
22 withdraw the motion for class certification to be revised at a
23 later date once we have a final set of pleadings, or I can
24 simply deny or strike that motion now as premature, but I do
25 not want a stale pending motion like that sitting out there on

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1 the docket, especially one that I know will need to be revised
2 after the pleadings are revised.

3 Additionally, because I am ordering an amended complaint
4 to be filed by the plaintiffs, I plan to indicate that, given
5 the forthcoming amended complaint, the motions to dismiss are
6 denied without prejudice to resubmission.

7 I am relatively firm in this plan going forward in this
8 case, but I do want to hear briefly from counsel on what I have
9 discussed today, as well as your timing and what you think you
10 need in terms of timing given I am going to require additional
11 conferences and amendments.

12 Ms. Trigilio, will you please speak up on behalf of the
13 plaintiffs?

14 MS. TRIGILIO: Thank you, Your Honor, and -- and --
15 and I do thank you for that really fulsome explanation of where
16 the Court stands on the motions to dismiss and the potential
17 amendments.

18 There are two issues that I'd like to follow up on for
19 Plaintiffs. One is with respect to additional allegations that
20 the Court would like to see regarding the Sixth Amendment claim
21 and issues that were raised in the motions to dismiss.

22 My reading of the motions to dismiss was, on the Sixth
23 Amendment claim, fully hoping to dismiss for lack of standing,
24 which is specifically failure to allege an injury in fact, and
25 our opposition specified that the injury in fact is the

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1 deprivation -- was the deprivation of counsel of the initial
2 bail hearing and that that's fairly traceable to the
3 Defendants' (indiscernible), and, if you only dispute -- or the
4 legal dispute over whether or not the plaintiff had to
5 affirmatively request counsel or, rather -- a bizarre
6 position -- that the right automatically kicked in, in virtue
7 of the fact that there's a criminal prosecution, and counsel is
8 required unless it's validly waived.

9 So, given that the Sixth Amendment issue is really, from
10 my reading, a legal dispute and not a factual dispute, I'd like
11 a little more clarity on what the Court is looking for in terms
12 of Sixth Amendment allegations.

13 THE COURT: Okay. And what's your second issue?

14 MS. TRIGILIO: The second -- thank you, Your Honor.

15 The second is with respect to the pending class
16 certification motion. The reason that the plaintiffs filed the
17 class certification motion together with the complaint is to
18 preserve the live controversy and preserve this Court's
19 jurisdiction even as the individual class representatives'
20 individual claims were mooted out; and, if that class
21 certification motion is not pending, there's a risk that the
22 entire case could be mooted, and we have to go back and file
23 all over again.

24 And so I understand that the Court doesn't want the motion
25 sort of hanging out there without a decision. Plaintiffs'

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1 proposal would be to administratively stay that motion and then
2 let the Court schedule for further briefing since we request
3 supplemental briefing on the class certification motion after a
4 class cert discovery has been conducted.

5 THE COURT: Thank you.

6 On -- with -- with response to your first question
7 regarding the Sixth Amendment allegations, as I stated in my
8 comments, that was a particular issue that I wanted to see
9 flushed out a bit more in the complaint, more so, I think, with
10 some of my overarching comments about the allegations and --
11 and being specific as to the specific plaintiff and the
12 specific defendant, but that may be one that certainly has to
13 be flushed out on a motion -- a further motion to dismiss if
14 the parties aren't seeing eye to eye on that one.

15 So I appreciate you raising that with me, but I think, at
16 this juncture, you know, my general comments apply to the
17 amended complaint as a whole, and that certainly may be a
18 claim, if you-all continue to have disputes over, that I will
19 have to resolve on motion practice.

20 On your second issue, I would like to hear from the
21 defendants on it, but I -- I -- I -- I think that the proposal
22 that you're making is appropriate, and I -- I would be fine
23 with staying that motion pending a development of these
24 pleadings; and then, once we get past the pleadings stage, we
25 can address where we go from there and how that gets

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1 supplemented so that we're not, you know, looking at many
2 different filings that may cross-reference each other and --
3 and creating an issue, but I think that's something that we
4 could potentially work through, although I would like to hear
5 from Ms. Moore on that issue.

6 Ms. Moore?

7 MS. MOORE: Yes, Your Honor.

8 MS. TRIGILIO: Your Honor, this is Trisha Trigilio.
9 I apologize, but, before you turn to Defendants, just on that
10 final note, we'd like to also make it clear that, to the extent
11 that there's an amended complaint -- that the allegations in
12 the amended complaint that will -- will relate back with
13 respect to the -- the class certification motion so that the
14 defendants -- you know, if we go through this procedure, we
15 prefer an agreement among the parties and with the Court that
16 the defendants aren't going to come back and argue that the
17 class certification motion is now moot because we've filed an
18 amended complaint --

19 THE COURT: Okay.

20 MS. TRIGILIO: -- (indiscernible).

21 THE COURT: Very helpful.

22 Ms. Moore, what is the defendants' motion on that?

23 MS. MOORE: Yes, Your Honor. We have no objection to
24 the motion for class certification being stayed and then having
25 the plaintiffs then amend it to be more in line with whatever

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1 the claims are after amendment and any rulings by the Court on
2 any motions to dismiss that might be warranted after amendment.
3 We understand that the complaint, as amended, would relate back
4 to the filing date. So we're not quite sure that there's an
5 issue, but we -- we're in agreement with the -- we can have
6 that stay on file as stayed and to address it under the
7 to-be-determined scheduling order on class certification
8 briefing.

9 THE COURT: Okay. Anything further, Ms. Moore, from
10 the defendants' perspective?

11 MS. MOORE: No, Your Honor.

12 THE COURT: So let me tell you-all what I'm thinking
13 in terms of timing. I believe it's a generous amount of time,
14 but I realize that this is a case with many moving parts and
15 a lot of lawyers involved, and so I want you-all to be able to
16 confer in good faith and have the time to do so, and I know
17 you-all are very busy with other cases as well, and so the time
18 that I've given -- I feel -- I feel it is generous. You-all
19 may tell me it is not, but I will tell you what I'm thinking,
20 and then we can talk about that.

21 When I -- when I circle back with both counsel, I also
22 want to hear whether, going forward in this case, you desire
23 telephonic proceedings like what we're having this afternoon or
24 whether you would desire in-person proceedings or some
25 combination of the two. I'm certainly aware that we have

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1 counsel out of state, and, given the ongoing pandemic, I want
2 to be sensitive to that. I also, before I took the bench,
3 practiced in other states, and I was always very appreciative
4 when I knew that the judge did not mind if I appeared
5 telephonic.

6 So I am open to suggestions there, and I will turn back to
7 you-all on that issue, as well as the proposed schedule.

8 So here is what I plan to propose: that -- and -- and
9 take notes, and then I'll start with Plaintiffs' counsel, then
10 Defendants' counsel, and we can sort through some of these
11 dates if this does not work.

12 What I would like to propose is that the counsel for the
13 parties confer -- that they're ordered to confer in good faith
14 within 7 days of today's conference regarding the claims in
15 this lawsuit and all arguments asserted in the motions and
16 associated briefs;

17 that, within 30 days of today, Plaintiffs' counsel shall
18 circulate a proposed amended complaint to Defendants' counsel;

19 within 45 days of today, counsel for the parties shall
20 confer again regarding the proposed amended complaint in an
21 attempt to resolve any remaining disputes without Court
22 involvement;

23 within 60 days of today, Plaintiffs shall file an amended
24 complaint and are granted leave to do so under Federal Rule of
25 Civil Procedure 15(a) (2);

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1 within 60 days of today, Plaintiffs shall file a joint
2 status report updating the Court on the status of the issues
3 raised today and in the motions, including the dates of the
4 conferences, lengths of the conferences, participants,
5 identification of all issues that were resolved at the
6 conferences, and identification of the issues that remain.

7 Defendants shall respond to any amended complaint within
8 14 days of service of the amended complaint under Rule
9 15(a)(3).

10 And, because I am granting leave for Plaintiffs to file an
11 amended complaint, I will deny the motions to dismiss at this
12 time without prejudice to another motion to dismiss, if
13 absolutely necessary, filing -- after the filing of the amended
14 complaint.

15 And then we will internally calendar in chambers an
16 appropriate time to set up another conference to arrange class
17 briefing likely during a scheduling and status conference; and,
18 that, we would either do in person, by telephone, or a
19 combination, depending on what you-all seek to do in terms of
20 the timing.

21 So, Ms. Trigilio, let me hear from you first on the --
22 this time frame.

23 MS. TRIGILIO: Your Honor, that time frame generally
24 sounds acceptable to Plaintiff.

25 I do have a -- a personal request for the Court. I'm

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1 actually -- I'm out of the country right now because I'm
2 intending to go on vacation in the next week; and so, if it was
3 possible to extend the deadlines for the initial conference
4 between the parties to 14 days from today's hearing, I would
5 appreciate that just as a -- a personal request.

6 THE COURT: Okay. And, then, what about going
7 forward in this case in terms of proceedings? What is the
8 Plaintiffs' preference? Is it to be telephonic? Is it to be
9 in person or a combination?

10 MS. TRIGILIO: I would say a combination, Your Honor.
11 Generally, just for, you know, financial efficiency, we prefer
12 to appear by phone for proceedings that are less important.
13 Perhaps in the future, for something like a dispositive motion,
14 an in-person proceeding would make more sense just so we can --
15 you know, we can communicate more effectively. We'd be open to
16 that, but, generally, phone hearings would be our preference.

17 THE COURT: Okay. Thank you.

18 Ms. Moore, let me hear from you on the time frames that
19 I've proposed and also on the issue of in-person or telephonic.

20 MS. MOORE: Yes, Your Honor. We have no problems
21 with the time frames that you've proposed.

22 We also have no objection to Ms. Trigilio's request of
23 pushing the 7 days out to 14 days.

24 And we have no problems with telephonic hearings.

25 THE COURT: Okay. Excellent.

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1 We will go with the 14 days, Ms. Trigilio, and I hope that
2 you are able -- I'm sure it is much awaited time off, so I do
3 hope you are able to enjoy that and not be worried about this
4 case. I know that this process that I'm proposing may seem
5 atypical, but these are extraordinary times at the courthouse,
6 and I feel I'm -- I'm forced to use effective ways to
7 streamline the issues so that we can get and keep cases moving
8 along, though I do think that this direction that I'm giving
9 this case is certainly consistent with Rule 1 and my obligation
10 to manage my own docket.

11 I will put those time frames in -- the 14 days on the
12 conference, the other dates that are given -- along with some
13 reminders about my expectations that I think I've laid out in
14 today's conference, and that will all be in a -- in a minute
15 sheet -- I don't know how short it will be, so I won't say
16 "short minute sheet" but a minute sheet on the docket that
17 you-all will receive.

18 Are there any questions about anything before we conclude,
19 or do you need any clarity?

20 Ms. Trigilio?

21 MS. TRIGILIO: None, Your Honor.

22 THE COURT: Okay. Ms. Moore?

23 MS. MOORE: No, Your Honor. Thank you.

24 THE COURT: Thank you all, and I look forward to
25 moving forward with you-all in this case, and have a great rest

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of your Friday and a great weekend. Thank you very much.

(The proceedings are concluded at 1:46 p.m.)

REPORTER'S CERTIFICATE

I, CASSY KERR, Federal Official Court Reporter in and for the United States District Court for the Western District of Oklahoma, do hereby certify that, pursuant to 28 U.S. Code 753, the foregoing is a true and correct transcript Of the stenographically reported proceedings held in the above-entitled matter, and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED THIS 9th day of October, 2021.

/s/Cassy Kerr

Cassy Kerr, CSR, CCR, RPR, CRR, CRC, NP-OK
Oklahoma CSR License No. 1367
Federal Official Court Reporter